

THE DIRECTION OF DIVORCE REFORM IN CALIFORNIA: FROM FAULT TO NO-FAULT . . . AND BACK AGAIN?

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“The time has come to acknowledge that our present social and legal procedures for dealing with divorce are no longer adequate.”

-- Governor Edmund G. Brown, Sr., 1966, explaining his support of no-fault divorce reforms.

INTRODUCTION

Three years after Governor Brown urged reforming California’s fault-based divorce law, Governor Ronald Reagan signed the Family Law Act of 1969 into law, making California the first no-fault divorce state in the nation. Or, looked at by some in another way, “On September 5, 1969, with a stroke of his pen, California governor Ronald Reagan wiped out the moral basis for marriage in America.”¹ Since California's historic divorce reform, every state has enacted some form of no-fault divorce.

Nationally, there has been some movement in recent years to return to fault-based divorce, or to at least impose additional obstacles to getting a divorce or to getting married. This movement was spurred by what has been seen as increasingly high divorce rates, the high rate of poverty in single-parent homes, and perceptions that the real “victims” of no-fault have been the children of divorce. The movement to restore fault divorce, or move in that direction, is guided by the hope that the imposition of obstacles to getting divorced will remove the “easy out” reformers say no-fault has provided. In the absence of no-fault, reformers continue, couples will be forced to work through their problems and the end result will be increased numbers of families remaining intact, and healthier more stable children.

Others disagree, however, contending that the return to fault-based divorce will bring with it greater numbers of families who are physically separated without being legally divorced, fewer marriages, and an increased number of women and children living in violence and living with high levels of conflict.

One judge in Australia posed an interesting solution to what he saw as the growing divorce problem. According to one tabloid newspaper, an Australian judge ordered a couple who went to court seeking a divorce “after four long years of bickering and battering . . . to

forget about the divorce, to go home arm in arm, and to make mad, passionate love every day for the next six months.” The judge told the couple that if they followed his advice to the letter, and still wanted the divorce in six months, he would grant it. According to the caption on the picture accompanying the story, “Loving couple Dustin and Angela Womack may call off their divorce after months of making whoopee.”²

But that unusual “solution” aside, critics have blamed no-fault divorce laws for many of the serious ills of society, including: increased child poverty, high school drop-out rates, teenage pregnancy, low birthweights, greater welfare dependence, and juvenile crime. Studies have indeed shown that such ills are more prevalent in single-parent homes, and the rise of no-fault divorce has led to an increase in the number of single-parent homes.

But is no-fault divorce really to blame, or are other larger forces at the root of these challenging societal ills? Some place the blame squarely on no-fault. But others point to studies which show that single-parent homes are substantially poorer than two parent homes, and poverty, rather than divorce law, is what can be blamed for these problems.

This paper, prepared for a hearing by the Assembly Judiciary Committee of the State of California, will examine these perplexing questions.

SECTION ONE: BRIEF HISTORY OF GROUNDS FOR DIVORCE IN BOTH THE FAULT AND NO-FAULT ERAS³

Before turning to a review of the goals of the “no-fault” revolution in the United States started by California, a brief history of the development of divorce and divorce laws is helpful to understanding the context of today’s arguments over no-fault divorce.

Many American states enacted divorce legislation soon after Independence, in the 1780s and 1790s. Connecticut was the most liberal, permitting divorce for “...adultery, fraudulent contract, desertion for three years, or prolonged absence with a presumption of death.”⁴ In 1843, the state added two additional grounds for divorce: habitual drunkenness and intolerable cruelty. The Connecticut state legislature also dissolved marriages on other grounds by legislative action. In 1849, the courts were given sole responsibility for divorce, and grounds were extended to include “life imprisonment, any infamous crime involving a violation of the conjugal duty, and -- most important -- ‘any such misconduct as permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation.’”⁵

Divorce laws were generally more liberal in the West than in the rest of the country. California’s first divorce law, in 1851, contained the following grounds for divorce: impotence, adultery, extreme cruelty, desertion or neglect, habitual intemperance, fraud,

and conviction for a felony. In practice, the courts extended the definitions of these terms.

Most American states broadened the grounds for divorce throughout the 19th century, encompassing more and more matrimonial conditions. By 1900, most states had adopted four major elements of divorce law: “fault-based grounds, one party’s guilt, the continuation of gender-based marital responsibilities after divorce, and the linkage of financial awards to findings of fault.”⁶

The divorce rate in the United States increased from 1.2 per 1,000 existing marriages in 1860 to 4.5 in 1910. These rates were significantly higher than in Europe, as remains the case today. Nonetheless, divorce rates have risen steadily over the last 100 years in all Western countries where divorce is permitted, accelerating in the 1960s and early 1970s. A wide variety of contributive factors have been studied. One analysis finds that three factors have generally been used to explain the increase: “...easier access to divorce, married women’s employment, and changes in social values.”⁷

California’s enactment of the first no-fault divorce law in 1969 “...launched a legal revolution.”⁸ Nearly every state enacted some form of no-fault divorce in the following decade. A 1985 review of family law in the United States found that 18 states had enacted “pure” no-fault divorce laws, of which 14 made marital breakdown the only ground for divorce: Arizona, California,⁹ Colorado, Florida, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Montana, Nebraska, Oregon and Washington.¹⁰ Three other states (Kansas, New Mexico and Oklahoma) made “incompatibility” the only ground for divorce. Twenty-two states added the no-fault standard of “marital breakdown” to existing fault-based grounds for divorce.

California’s No-Fault Divorce Law

The current grounds for divorce in California:

- (a) Irreconcilable differences, which have caused the irremediable breakdown of the marriage.
- (b) Incurable insanity.

California Family Code §2310.

Table 1 details the change from a fault-based system of contestable divorce, tied to one party’s guilt and linked to continuing financial obligations, to a no-fault “petition for dissolution” which does not require the consent of both parties and is based on “irreconcilable differences.”

As the grounds for marital dissolution have expanded in Western societies over the last 200 years, divorce has become more accessible and the divorce rate has increased. Nonetheless, there appears to be no clear causal link, as social, economic, demographic, cultural and institutional factors all appear to be key influences. *As a practical matter, commentators note that marriage relationships can end whether or not divorce is*

available, and that divorce allows the possibility of remarriage.¹¹

Table 1
Summary of Changes in Divorce Law

Traditional Divorce	No-Fault Divorce
<i>Restrictive Law</i> To protect marriage	<i>Permissive Law</i> To facilitate divorce
<i>Specific Grounds</i> Adultery, cruelty, etc.	<i>No grounds</i> Marital breakdown
<i>Moral Framework</i> Guilt vs. innocence	<i>Administrative framework</i> Neither responsible
<i>Fault</i> One party cause divorce	<i>No fault</i> Cause of divorce irrelevant
<i>Consent of Innocent Spouse Needed</i> Innocent spouse has power to prevent or Delay the divorce	<i>No consent needed</i> Unilateral divorce No consent or agreement required
<i>Gender-based responsibilities</i> Husband responsible for alimony Wife responsible for custody Husband responsible for child support	<i>Gender-neutral responsibilities</i> Both responsible for self-support Both eligible for custody Both responsible for child support
<i>Financial Awards Linked to Fault</i> Alimony for “innocent” spouse Great share of property to “innocent” Spouse	<i>Financial Awards Based on Equality and Need</i> Alimony based on need Property divided equally
<i>Adversarial</i> One party guilty, one innocent Financial gain in proving fault	<i>Nonadversarial</i> No guilty or innocent party No financial gain from charges Amicable resolution encouraged
Source: Lenore Weitzman, <u>The Divorce Revolution</u> , The Free Press, 1985, at page 40.	

SECTION TWO: THE BI-PARTISAN DECISION TO END FAULT-BASED DIVORCE

The impetus for the nation's no-fault divorce revolution started by a Democratic California governor, but it became a reality by the stroke of a Republican governor's pen. On May 11, 1966, Governor Edmund G. Brown established the Governor's Commission on the Family. The Commission was created to begin a "concerted assault on the high incidence of divorce in our society and its often tragic consequences."¹² Governor Brown charged the Commission with the task of addressing ways the family law system, substantively and procedurally, could function more effectively.

The Commission came up with a series of recommendations, including a unified statewide Family Court system with jurisdiction over all matters relating to the family, and an elimination of fault grounds for divorce, division of property, and support matters. The Commission believed these recommendation would "establish procedures for the handling of marital breakdown which will permit the Family Court to make a full and proper inquiry into the real problems of the family[,] . . . which will enable the Court to focus its resources upon the actual difficulties confronting the parties."¹³ According to one member of the Governor's Commission, the motivations of the members of the Commission and those who participated in the effort to reform California's divorce laws were far from uniform. However, one common viewpoint shared by most was that divorce based on fault no longer served the public interest. The Commission therefore undertook to design and implement a divorce law that would take account of the realities of married life, the economic needs of divorced dependent spouses, and the best interest of children.¹⁴

On September 5, 1969, Governor Ronald Reagan signed California's new and revolutionary Family Law Act into law. Although not achieving the Family Court envisioned by the Commission, the Family Law Act made the Commission's no-fault divorce concept a reality. "At the time, such legislation seemed humane and enlightened. It was hailed as an overdue reform of a wink-wink, nudge-nudge system rife with hypocrisy and lurid accusations. Under the fault-based system, the suing partner had to prove the fault of the other and show themselves to be blameless; otherwise their respective culpability canceled each other's claims. . . . Even when both partners desired the divorce, they were often reduced to perjury and collusion, sometimes staging adulterous liaisons to be captured in grainy photographs by lurking private eyes."¹⁵

The California reform effort that produced the Family Law Act ended in 1969. One of its major goals, and its most enduring achievement, was "to free the administration of justice in divorce cases from the hypocrisy and perjury that had resulted from the use of marital fault as a controlling consideration in divorce proceedings."¹⁶

SECTION THREE: KEY ISSUES SURROUNDING THREE DECADES OF NO-FAULT DIVORCE

In the almost three decades since California's no-fault divorce "revolution" began, society, and its trends, have changed immensely. Many claims have been made about the effects of no-fault divorce in California and across the country. Following is a summary of some of the key issues that have been raised.

I. The Growing Divorce Rate

Opponents of no-fault believe that, in many cases, no-fault makes divorce too easy to resist for couples on the rocks. Without no-fault, the argument goes, many of those couples would find ways to stay together, and the divorce rate would not be nearly as high as it is. The commonly quoted statistic is that nearly 50 percent of all marriages will end in divorce.¹⁷

Critics of no-fault often focus on this statistic in questioning no-fault. According to the Sacramento based Capitol Resource Institute, "despite its prevalence, and despite its now undeniable impact upon the individuals involved, there remains a strong reluctance to do anything to reverse or even slow its spread. . . . 'If a disease were to afflict the majority of a populace, spreading pain and dysfunction throughout all age groups, we would be frantically searching for reasonable solutions. Yet this particular scourge has become so endemic that it is virtually ignored. The scourge is divorce, an oddly neglected topic in a nation that has the worst record of broken marriages in the entire world.'"¹⁸

However, the assertion that one-half of all marriages end in divorce, despite its popular usage and apparent influence on the literature on the subject, may be extremely misleading. According to pollster Lou Harris, "The idea that half of American marriages are doomed is one of the most specious pieces of statistical nonsense ever perpetuated in modern times. It all began when the Census Bureau noted that during one year, there were 2.4 million marriages and 1.2 million divorces. Someone did the math without calculating the 54 million marriages already in existence, and presto, a ridiculous but quotable statistic was born."¹⁹

Of course, the fact that divorce rates have increased substantially in the past 40 years is without question. Divorce rates began a steep increase in the mid-1960s, the tail end of the pre-no-fault era. Through the 1950s and 1960s, divorce rates remained fairly steady at fewer than 400,000 per year, or 9 to 10 divorces per 1,000 married women. But by 1965, the number of divorces jumped to 479,000 per year, or 10.6 for every 1,000 married women. By 1975, the number of divorces had topped 1 million per year, and the national divorce rate peaked in 1980, when there were 1,189,000 divorces, or 22.6 for every 1,000

married women.²⁰

II. Possible Causes of High Divorce Rates

Not surprisingly, many commentators associate the jump in divorce rates nationally with the advent of widespread no-fault divorce. “In 1960 16% of first marriages ended in divorce; today, the figure is closer to 50 percent. In the five years following the enactment of no-fault in California, the national divorce rate increased almost 40%.”²¹

However, there may be causal factors other than no-fault laws for divorce rate increases. Data from the U.S. Census Bureau show a sharp increase in divorce rates during and at the end of World War II. *Moreover, it is a little known but powerful fact that divorce rates across the country have been declining for the past decade.* The divorce rate per 1,000 population was 4.7 in 1989 and 1990, and is 11 percent lower than the peak rate of 5.3 in 1979 and 1981.²² And neither of these trends occurred at a time when there were any substantial changes in the nation’s divorce laws.

Perhaps the increase in the divorce rate that occurred shortly after the start of no-fault may really be attributed to the Vietnam War, or to the “Generation of Love” for which the 1970s has become so famous. On the other hand, one sociologist has posited that, “[t]he institution of marriage underwent a particularly rebellious and dramatic shift when women entered the work force. ‘People don’t have to stay married because of economic forces now,’ explains Frank Furstenberg, Jr., co-author of the 1991 *Divided Families*.²³ In short, any of these events may just as easily be responsible for the rising divorce rate as the advent of no-fault divorce.

Key for the consideration of various no-fault reforms, the data simply does not support attributing the rise in divorce rates solely to no-fault divorce. Even some of those who decry no-fault divorce concede that “[t]he causal connection between the unraveling of divorce laws and the unraveling of marriages is admittedly debatable.”²⁴ At any rate, policymakers considering the pros and cons of no-fault reform proposals must be wary of popular assertions that no-fault laws have been the cause of increasing divorce rates. But what about the effects of no-fault?

III. The Effects of Divorce on Children

The harm, many critics of no-fault divorce argue, is not that spouses divorce, but that more and more children are being raised in single-parent families, which may be harmful to their health and development. The fact is, from 1960 to 1994, the number of children living in married-couple families dropped from 88% to 69%. “Much of the rise in single-parent families results from the sharp increase in nonmarital childbearing. The proportion of births occurring out of wedlock jumped from 5 percent in 1960 to 31 percent in 1993.”²⁵

That children are affected by divorce and by being raised by one, rather than two, parents is undeniable. The extent to which they are affected, however, has been the subject of much debate. Among the most startling facts and statistics:

- ✍✍ Children of divorce are 70 percent more likely to have been expelled or suspended from school, and are twice as likely to drop out of school.²⁶
- ✍✍ Children from single-parent families score somewhat lower on intelligence tests, even after adjusting for socio-economic variables, and have much poorer records on measures of attendance, cooperation and effort at school. Father-absent children require more discipline, have considerably higher suspension rates, have lower GPA's, and repeat grades more often.²⁷
- ✍ Living in a mother-only family decreases a child's chances of completing high school by over 40 percent for whites, and 70 percent for blacks.²⁸
- ✍ Of juveniles and young adults serving time in long-term correctional facilities, 70 percent came from broken homes.²⁹
- ✍✍ Three out of four teen suicides are committed by children from broken homes.³⁰
- ✍✍ The Capitol Resource Institute reports that children from divorced families are two to three times as likely to have emotional or behavior problems compared to those who have both their father and mother present.³¹
- ✍✍ The Capitol Resource Institute also notes that children of divorce undergo greater incidence of depression, hostility, and loneliness than children from intact families.³² They assert that "[c]hildren of divorced suffer greatly in more ways than financially. They do poorer in school, exhibit depression and lower self-esteem, have behavior problems, and are plagued by earlier sexual and criminal activity. . . . [T]hese problems may increase and persist into later life."³³

However, the bases for these statistical horror stories are not without contention. *Some argue that the cause of these and other worrying social statistics is not divorce at all, but rather the increasing impoverishment of single-parent homes.* The rate of child poverty is five times higher for children living with single mothers than for children in intact families. In 1992, 53.4% of female-headed households with children subsisted below the poverty line, compared with only 10.7% of all other families with children.³⁴

The economic hardship suffered as a result of the divorce "increases the risk of

psychological and behavioral problems among children and may negatively affect their nutrition and health. Economic hardship also makes it difficult for custodial mothers to provide books, educational toys, home computers, and other resources that can facilitate children's academic attainment.”³⁵

Additionally, economic conditions as a result of divorce may require parents and children to relocate to neighborhoods where schools are poorly financed, crime rates are high, and services are inadequate. *According to this view, divorce affects children negatively to the extent that it results in economic hardship, but divorce itself cannot be blamed for the downfall.*³⁶

Others note that divorce is not the precursor for a child's poor performance. A study by Cherlin and Furstenberg shows that many, but not all, of the difficulties exhibited by children of divorce, such as behavioral problems and low academic test scores, are present prior to parental separation.³⁷ Rather than the divorce itself, it might be the *conflict* present in divorcing families that is responsible for the onset of such problems for children of divorced parents. Numerous studies show that children living in high-conflict two-parent families are at increased risk for a variety of problems. It seems likely, therefore, that many of the problems observed among children of divorce are actually caused by the conflict between parents that precedes and accompanies marital dissolution, not the legal act of formally ending what has already informally collapsed.³⁸

Other critics of the recent movement to end no-fault suggest that the differences between children of divorce and children of intact families are really not significant. One researcher found that, while divorce has a negative impact on children, it is not nearly as devastating as researchers like Judith Wallerstein contend. "Compared to never-divorced children, children of divorce exhibit more aggressive, impulsive and antisocial behaviors, have more difficulties in their peer relationships, are less compliant with authority figures and show more problem behaviors at school. Studies have also found that divorced children fare more poorly on IQ scores, on math and reading achievement scores and in grades than do their nondivorced counterparts. *But the magnitude of the differences between the two groups is consistently quite small. In short, there is no one-to-one relationship between divorce and psychological adjustment problems in children.*"³⁹

IV. The Effects of Divorce on Adults

Children, of course, are not the only ones who suffer after divorce. Reformers of no-fault divorce argue that divorce causes significant problems for adults as well as children, and the return to fault would improve the health and well-being of all parties involved. "Women who want to stay alive and well ought to stay married. Divorced women die prematurely at higher rates than married women, and are more prone to acute conditions such as infectious and parasitic diseases, respiratory illnesses, digestive-system illnesses and severe injuries

and accidents.”⁴⁰

And for men, the statistics are worse. The premature death rate from cardiovascular disease for divorced men is twice that of married men. The premature death rates due to pneumonia and suicide for white divorced men are four and seven times, respectively, those of their married counterparts. Data shows that married men and women have lower incidences of alcohol-related problems and other health risks than do divorced and widowed people. And the Capitol Resource Institutes notes that a study by the National Institute for Healthcare Research in Maryland found that divorced people are more likely to contract terminal cancer and commit suicide.⁴¹

However, the causal relationship between divorce and adult health problems remains, as with children of divorce, unclear. Some experts believe that the health benefits men enjoy from marriage are attributable to the fact that wives often monitor their husband's health behavior, and because marriage provides incentives for men to avoid high-risk behaviors.⁴² Others believe the asserted health benefits of marriage for men go too far, and that associating the contracting of terminal cancer with divorce seems a tenuous argument not yet supported by the data.

SECTION FOUR: PROPOSALS TO MODIFY NO-FAULT DIVORCE

In response to what is perceived as the high rate of divorce and the problems associated with no-fault, many states have proposed legislation in the past year to impose substantial obstacles to divorce and to marriage. Only Louisiana's proposal, known as Covenant Marriage, successfully survived the legislative process and became law. Following is a brief summary of some of the proposals that have been debated or will soon be debated around the nation:

California: AB 913 (Runner), as proposed to be amended, creates the Family and Children Preservation Act. The bill requires parties filing for dissolution, legal separation or nullity, and who have minor children to file a “joint parenting plan,” or if the parents cannot agree on a parenting plan, to file a pre-mediation parenting questionnaire. The bill allows dissolution based on irreconcilable differences only upon the mutual consent of the parties and only upon completion of an education or counseling program, either separately or together. If the parties do not consent to the dissolution, a party must prove fault by a preponderance of the evidence in order for the court to grant the dissolution.

California: Proposed statutory initiative 97RF0053 adds traditional fault-based grounds for dissolution and eliminates “irreconcilable differences” as a ground for divorce when there is a minor child of the marriage or either of the parties has sole or joint physical custody of a child from a different relationship. The proposed initiative provides defenses to claims of fault which, if found to be true, prohibit the court from granting a dissolution.⁴³

Florida: SB 1178 requires all applicants for a marriage license to complete a course of premarital orientation, of not less than four hours, as condition precedent to obtaining a marriage license.

Georgia: HB 434 authorizes couples to seek divorce on the ground that the marriage is irretrievably broken (the no-fault ground) only if the parties consent and there are no minor children, or a party has been convicted of domestic abuse or a protective order has been granted.

Hawaii: HB 1172 requires couples with children to obtain pre-divorce counseling to ensure the children's welfare after the divorce, and imposes an additional one-year waiting period onto the time already required to get a divorce.

Indiana: HB 1049 establishes two classifications of marriage licenses – contract marriage licenses and covenant marriage licenses. The bill provides that only a marriage based upon a contract license may be dissolved without providing fault.

Kansas: SB 312 allows divorce based on irretrievable breakdown of the marriage only if both parties voluntarily consent to the divorce, the parties do not have any minor children, and neither party is the physical custodian of a minor child from another relationship.

Louisiana: HB 756, Louisiana's covenant marriage law, defines covenant marriage as one in which the parties understand and agree that the marriage is a lifelong relationship. Parties to a covenant marriage must receive pre-marital counseling. A covenant marriage may only be dissolved for fault, and only after parties receive pre-divorce counseling. Parties married prior to the effective date of this law may execute a declaration of intent to designate their marriage as a covenant marriage.

Massachusetts: HB 1168 prohibits unilateral no-fault divorce for irretrievable breakdown of the marriage.

Michigan: A package of proposals abolish unilateral no-fault divorce, whether or not children are involved and require pre-marital counseling.

New Jersey: AB 2547 eliminates the no-fault provision as a ground for divorce.

Pennsylvania: SB 442 prohibits the court from granting a marital dissolution when the parties have any minor children between the ages of six and sixteen unless the parties demonstrate that the children have attended at least three counseling sessions between the time of separation and the granting of the divorce decree.

CONCLUSION

In considering the effects of various proposals to reform California's no-fault divorce laws, it is evident no clear consensus yet exists about the causes of divorce, let alone the effects

on parents and children. Yet there does appear to be a growing trend nationwide to fault state no-fault laws with undermining the strength of marriage in our society.

For example, the Family Research Council questions what message no-fault divorce laws provide about the sanctity and permanence of marriage. “What are we communicating when it is easier to divorce your wife of 25 years than it is to let go that employee you hired two weeks ago?” We have undergone a significant shift, they contend, from a culture of marriage to a culture of divorce.⁴⁴ And Hillary Clinton has been quoted showing support for some form of divorce reform: “I think getting a divorce should be much harder where children are involved. . . . Divorce has become too easy because of our permissive laws and attitudes.”⁴⁵ However, it remains to be seen if divorce reform is the answer to protecting children from the problems associated with being raised in single-parent homes, the answer to the high divorce rate, or even the answer to re-instilling in people’s mind the sanctity and permanence of marriage. In addition, key issues about the likely results of the no-fault reform movement remain unanswered, including:

Issue #1: The Need for More Study

Is there sufficient data supporting the proposition that making it harder to get divorced will not return the state to the old “wink-wink, nudge-nudge” grounds for divorce so common in the fault-era? Review of the data and available literature on divorce leads to one inevitable conclusion: *the information is confusing and inconclusive*. There simply may not be sufficiently reliable data on the effects of divorce to justify movement away from the no-fault system at this time.

According to Herma Hill Kay, Dean of Boalt Hall School of Law and a well-known expert on California divorce laws, “[t]he California Family Law Act of 1970, which embodied the no-fault divorce law, was the concrete result of seven years of work by legislative committees, citizens’ advisory groups, a governor’s commission, and family law committees of state and local bar associations.”⁴⁶ Before quickly jumping on the divorce reform bandwagon, policymakers may wish to consider whether sufficient study has been done at this time to warrant a return to fault, or even a substantial move in its direction.

The American Bar Association and the American Psychological Association, believing that there currently is insufficient information available to make a well informed decision on how divorce laws should be reformed, if at all, strongly follow this view. The two organizations jointly propose a co-sponsored Institute on Families, Marriage and Divorce to gather, review, analyze and disseminate information from a wide array of sources and disciplines related to families, marriage, and divorce. Though these organizations currently lack the necessary funding to undertake this joint venture, the Legislature may wish to consider formal study of this important social issue, especially given the state’s recent trend in the opposite direction.⁴⁷

Issue #2: Can Divorce Reform Pass Constitutional Muster?

The question has also been raised whether some of the no-fault reform proposals suggested by the various states would pass constitutional muster. According to one legal commentator, “The Supreme Court has repeatedly recognized that individuals have a fundamental right to make personal, intimate decisions concerning marriage and family life. Because the decision to divorce . . . is one of those personal and intimate decisions, the state may not completely restrict the right to divorce and . . . cannot pass any law that would place a significant burden on an individual’s decision to leave the marriage. Although some of the proposals, such as short waiting periods and counseling, would pass this test, others, such as mandatory consent requirements and long waiting periods, would place an undue burden on the right to divorce, and might therefore violate the constitution.”⁴⁸ Thus any such divorce reform proposals must be analyzed in light of these constitutional constraints.

Issue #3: Will Divorce Reform Work?

Finally, any divorce reform proposals must be analyzed as to their possible unintended effects. In spite of increasing divorce rates, in 1990, the vast majority (71%) of the 64 million American children lived in two-parent households, and most (58%) lived with their biological parents. Today, 7.3% (or 4.7 million) of children live with an unmarried parent, 9.1% (5.9 million) live with a divorced parent, and 7.4% (4.8 million) live with a separated or widowed parent.”⁴⁹

What will a move back in the direction of fault-based divorce accomplish? Some assert that it will mean more families remaining intact, which, whether because of the divorce itself or the better financial condition often present in a two-parent family, will mean fewer problems for children. Others worry that fault-based divorce laws would negatively impact spouses seeking to get out of abusive relationships. “It is possible that such victims would be tempted to simply flee these relationships rather than hazard the difficulties of proving grounds. In taking that step, they would be risking severe financial hardships. . .”⁵⁰ Lawyers also warn that returning to a fault-based system would bring with it another layer of litigation to many divorce proceedings, resulting in more emotional frustrations and higher legal bills.⁵¹

Critics of the return to fault-based divorce caution that:

“Those who advocate returning moral judgments to the divorce arena have a short memory. By the late 1960s, even some church leaders had recognized that the fault system was out of step with modern family life. . . . [T]he advent of no-fault did not change access to divorce so much as it legitimated practices that already were occurring.” Should some of the mutual consent or

other proposals “become law, couples would once again be forced to stage elaborate theatrics to achieve a quick divorce. Alternatively, couples could simply drive over state lines to a jurisdiction that provides no-fault divorces.”⁵²

Moreover, if the goal of bringing fault back to divorce is improving the health and welfare of California’s children, others argue that the return to fault may not be the answer and may in fact lead to unintended consequences:

“If the legal system were changed to make divorce more difficult, it would most likely increase the proportion of children living in separated but nondivorced families. It would also increase the proportion of people who spend their childhood in high-conflict two-parent families. . . . Given that the legal system cannot stop married couples from living apart or fighting, changing the legal system to decrease the frequency of divorce is unlikely to improve the well-being of children.”⁵³

On the other hand, the Capitol Resource Institute and other critics of no-fault argue that “no-fault divorce reduces the protections for spouses wanting to continue marriages.”⁵⁴

“Despite the changes in the law, many couples still marry under the guise of ‘til death do us part.’ These couples approach the altar under the belief that they are consummating a lifelong arrangement, solemnizing vows of lifelong fidelity. . . . Before no-fault divorce, the state backed up the couple’s vows, requiring a serious breach of conduct for the union to be broken.”⁵⁵

Additionally, the Capitol Resource Institute and other divorce reformers argue that “no-fault divorce reduces the negotiating power of spouses who do not want to end their marriages, especially women. Under the fault-based divorce system, the spouse who did not want to absolve the marriage received leverage from the more stringent divorce laws. Such parties were unlikely to agree to a divorce suit unless the financial settlement was to their liking.”⁵⁶ By removing fault from the equation used to determine the division of property and the amount of any support award, the argument suggests, no-fault enables the spouse who wants the divorce to leave the marriage without suffering any real consequences.

The only thing that may be indisputable in the growing debate about no-fault reform is that there are still many questions that need to be answered. The statistics about the divorce rate are confusing. The available data about the impact of divorce on children and adults is insufficient. It has not been proven that no-fault divorce is the true cause of the many problems associated with being raised in single-parent homes. Maybe those problems could be better addressed by focusing on how to lift single-parent families out of poverty.

Maybe no-fault divorce isn't the problem at all. And then again, maybe it is.

¹ Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, 77 POLICY REVIEW: THE JOURNAL OF AMERICAN CITIZENSHIP (May-June 1996).

² Joe Berger, *Divorce Judge Orders Couple to Have Sex Every Day – For Six Months*, WEEKLY WORLD NEWS, Sept. 2, 1997 at 19.

³ This helpful section of the background paper was prepared by Charlene Wear Simmons, Ph.D. of the California Research Bureau.

⁴ Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society*, Cambridge University Press (1988) at 440.

⁵ *Id.* at 442.

⁶ Lenore Weitzman, *The Divorce Revolution*, The Free Press, 1985, at 7.

⁷ Phillips, *supra* note 2, at 620.

⁸ Weitzman, *supra* note 5, at x.

⁹ California also includes “incurable insanity” as grounds for divorce, although it is rarely used.

¹⁰ Doris Freed and Timothy Walker, *Family Law in Fifty States: An Overview*, FAMILY LAW QUARTERLY, Vol. 18, Winter 1985, as cited in Weitzman, *supra* note 5, at 41.

¹¹ Approximately 75 percent of Americans divorced during the last 25 years remarried.

¹² Report of the Governor's Commission on the Family 1 (1966).

¹³ *Id.* at 2.

¹⁴ Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV 291, 299 (January 1987).

¹⁵ Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, 77 POLICY REVIEW: THE JOURNAL OF AMERICAN CITIZENSHIP (May-June 1996).

¹⁶ Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV 291, 299 (January 1987).

¹⁷ See, e.g., FAMILY RESEARCH COUNCIL, FAQ SHEET, WHAT IS FRC'S STAND ON DIVORCE REFORM; Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, 77 POLICY REVIEW: THE JOURNAL OF AMERICAN CITIZENSHIP (May-June 1996).

¹⁸ CAPITOL RESOURCE INSTITUTE, BREAKING UP IS EASY TO DO (1996), at 2, *quoting* pollster George Gallup, Jr.

¹⁹ J. Allan Petersen, *Better Families*, *quoted on* the Christianity.Net home page, “Preaching Resources,” (1996).

²⁰ Laura Gatland, *Putting the Blame on No-Fault*, 83 ABA JOURNAL 50 (April 1997).

²¹ Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, 77 POLICY REVIEW: THE JOURNAL OF AMERICAN CITIZENSHIP (May-June 1996). *See also*, CAPITOL RESOURCE INSTITUTE, BREAKING UP IS EASY TO DO (1996), at 1.

²² NATIONAL CENTER FOR HEALTH STATISTICS, ADVANCE REPORT OF FINAL DIVORCE STATISTICS, 1989 and 1990.

²³ Elizabeth Gleick, *Should This Marriage Be Saved*, TIME, Feb. 27, 1995, at 48.

²⁴ Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, 77 POLICY REVIEW: THE JOURNAL OF AMERICAN CITIZENSHIP (May-June 1996).

²⁵ Frank F. Furstenberg, Jr., *The Future of Marriage*, AMERICAN DEMOGRAPHICS, June 1996, at 34.

²⁶ FAMILY RESEARCH COUNCIL, FAQ SHEET, WHAT IS FRC'S STAND ON DIVORCE REFORM.

²⁷ Karl Zinsmeister, *Fathers: Who Needs Them?*, INSIGHT, FAMILY RESEARCH COUNCIL.

²⁸ *Id.*

²⁹ FAMILY RESEARCH COUNCIL, FAQ SHEET, WHAT IS FRC'S STAND ON DIVORCE REFORM.

³⁰ *Id.*

³¹ CAPITOL RESOURCE INSTITUTE, BREAKING UP IS EASY TO DO (1996), at 10.

³² *Id.*

³³ *Id.* at 6.

³⁴ ROCKY MOUNTAIN FAMILY COUNCIL, FACT SHEET NO. 571, THE FAILURE OF NO-FAULT DIVORCE.

³⁵ Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, in *The Future of Children: Children and Divorce*, Volume 4, No. 1, 143, 151 (Spring 1994).

³⁶ Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, in *The Future of Children: Children and Divorce*, Volume 4, No. 1, 143, 151 (Spring 1994).

³⁷ *Id.*

³⁸ *Id.*

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- ³⁹ Barbara Fitzsimmons, *Broken Families and Broken Dreams*, SAN DIEGO UNION TRIBUNE, Oct. 6, 1997 (emphasis added).
- ⁴⁰ John J. DiIulio, Jr., *Divorce is Deadly, Especially for Kids*, SACRAMENTO BEE, April 20, 1997, Forum, page 1.
- ⁴¹ John J. DiIulio, Jr., *Divorce is Deadly, Especially for Kids*, SACRAMENTO BEE, April 20, 1997, Forum, page 1; Frank F. Furstenberg, Jr., *The Future of Marriage*, AMERICAN DEMOGRAPHICS, June 1996, at 34; CAPITOL RESOURCE INSTITUTE, *BREAKING UP IS EASY TO DO* (1996), at 7.
- ⁴² Frank F. Furstenberg, Jr., *The Future of Marriage*, AMERICAN DEMOGRAPHICS, June 1996, at 34.
- ⁴³ This initiative has not begun the process of getting the signatures to qualify for the November ballot.
- ⁴⁴ FAMILY RESEARCH COUNCIL, FAQ SHEET, WHAT IS FRC'S STAND ON DIVORCE REFORM.
- ⁴⁵ Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, 77 POLICY REVIEW: THE JOURNAL OF AMERICAN CITIZENSHIP (May-June 1996), quoting Hillary Rodham Clinton's syndicated newspaper column.
- ⁴⁶ Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 292 (January 1987).
- ⁴⁷ As of 1981, the state of California stopped collecting divorce statistics. A review of statewide divorce data shows that only two other states (Louisiana and Indiana) fail to gather this critical information. Family Research Council, *State-By-State Divorce Rates*, IN FOCUS.
- ⁴⁸ Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607 621-622 (February 1997).
- ⁴⁹ *Epidemiology of Divorce*, in *The Future of Children: Children and Divorce*, Volume 4, No. 1, 26 (Spring 1994).
- ⁵⁰ Laura Gatland, *Putting the Blame on No-Fault*, 83 ABA JOURNAL 50, 54 (April 1997).
- ⁵¹ *Id.*
- ⁵² *Id.* at 632 (February 1997).
- ⁵³ Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, in *The Future of Children: Children and Divorce*, Volume 4, No. 1, 143, 152-153 (Spring 1994).
- ⁵⁴ CAPITOL RESOURCE INSTITUTE, *BREAKING UP IS EASY TO DO* (1996), at 7.
- ⁵⁵ *Id.*
- ⁵⁶ *Id.* at 8.